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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

94-106

BEFORE THE

Federal Communications Commission

State Petitions of Hawaii, Arizona, California, Connecticut, Louisiana, New York, Ohio, and Wyoming to Retain Authority Over Intrastate Mobile Service Rates	) Hawaii, PR File No. 94-SP1;) Arizona, PR File No. 94-SP2;) California, PR File No. 94-SP3;) Connecticut, PR File No. 94-SP4;) Louisiana, PR File No. 94-SP5;) New York, PR File No. 94-SP6;) Ohio, PR File No. 94-SP7;) Wyoming, PR File No. 94-SP8

COMMENTS OF THE NATIONAL CELLULAR RESELLERS ASSOCIATION

The National Cellular Resellers Association (NCRA), by its attorneys, hereby submits its Comments in response to state petitions filed pursuant to Section 332(c)(3)(B) of the Act.[1/] NCRA's members comprise resellers of cellular service in markets across the country. The Association's objectives include

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[1/] Section (c)(3)(A) preempts states from regulating rates and entry conditions of CMRS providers. However, Section (c)(3)(B) permits states which regulated CMRS rates and entry conditions as of June 1, 1993 to petition the Commission by August 10, 1994 to continue this regulatory authority. States filing petitions must demonstrate that: (1) market conditions fail to protect CMRS subscribers from unjust or unreasonable rates or rates that are unjustly or unreasonably discriminatory or; (2) such market conditions exist and CMRS is a replacement for a substantial portion of landline telephone exchange service within the state.

supporting the growth and availability of commercial mobile radio service (CMRS) for individuals and business and ensuring a competitive marketplace for such services through the promotion of resale activities.

Eight states[2/] petitioned the Commission on or before the statutory deadline to continue regulating the rates and/or entry conditions of CMRS providers, in particular, facilities-based cellular carriers. In the aggregate, the petitioning states represent approximately 30 percent of the total population of the United States and roughly the same percentage of all U.S. cellular subscribers. Generally, states filing petitions describe the failure of the cellular duopoly to produce competitive cellular markets within their boundaries.[3/] These states correctly believe that until such time that effective competition arrives, perhaps in the form of personal communications services and enhanced

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[2/] Arizona, California, Connecticut, Hawaii, Louisiana, New York, Ohio, and Wyoming. California's Petition is supported by an extensive analysis but, some of the data has been submitted confidentially under seal. NCRA has this day filed a motion to unseal for the benefit of participating parties those petitions of California's submission not now available to the public and reserves the right to submit further comments in support of the California request after it obtains access to all the data.

[3/] The Arizona petition points out that a number of the state's rural markets are *monopolies* in that only one carrier offers service to the public.

specialized mobile radio, continued rate regulation is necessary to restrain the dominating market power of cellular duopolists.

The petitioning states' critical view of the state of competition in the cellular industry is by no means an anomaly. Indeed, a number of Federal agencies, including the Commission itself, have issued no less than eight reports over the past three years describing in various detail the harm caused consumers by the cellular duopoly.[4/] The most recent report is perhaps the most compelling. The Department of Justice, after conducting "extensive investigations" into the cellular industry which included review of numerous carrier internal documents,[5/] concluded that (1) cellular exchange markets are not competitive, (2) cellular duopolists have substantial market power, and (3) cellular carriers exercise bottleneck control over their licensed facilities.

The Commission's own position of record regarding the state of competition in the cellular industry is consistent with that of DOJ. Since 1985, the Commission has classified licensed cellular

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[4/] See Appendix A, "Federal Reports Supporting Lack of Cellular Competition."

[5/] United States v. Western Electric, Memorandum of the United States in Response to Bell Companies' Motion for Generic Wireless Waivers, Civ. Action No. 82-0192 (filed July 25, 1994) (DOJ).

carriers as dominant common carriers,[6/] that is, carriers having market power, and despite several subsequent proceedings related in various ways to the state of cellular competition, the Commission has not found it necessary to change the classification. Moreover, as recently as July 1 of this year the Commission essentially confirmed its position that cellular carriers have market power by tentatively concluding that cellular carriers should have equal access obligations imposed upon them[7/] in accordance with the Commission's findings that there is not sufficient evidence to conclude that the cellular services marketplace is fully competitive. Docket No 93-252 (Second Report and Order, released March 7, 1994).

Against this backdrop, states covering nearly a third of all cellular consumers have petitioned the Commission for continued authority to regulate cellular rates. These figures emphasize that state officials who oversee a substantial portion of the Nation's cellular industry continue to have serious concerns about

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6/ Fifth Report and Order, 98 FCC 2d 1191, 1204 n. 41 (1985).

7/ (Notice of Proposed Rule Making and Notice of Inquiry, In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Docket No. 94-54, RM-8012, July 1, 1994.)

the level of competition in the cellular marketplace and whether consumers, absent regulation, would have access to just, reasonable, and nondiscriminatory service rates. Thus, these petitions are motivated by the states' desire to protect consumers from the same perilous market conditions whose existence was acknowledged by the Commission in classifying cellular carriers as dominant common carriers and reaffirmed only weeks ago in the equal access proceeding. In order for the Commission to reject some or all of these petitions, it must reject its own views as well as those of DOJ, the agency charged with enforcing Federal antitrust laws, regarding market conditions in the cellular industry. The Commission has no basis for doing so unless compelling information is brought to light which contravenes the findings of the petitioning states, the Justice Department, and its own staff. NCRA knows of no such information which exists today.

While the Commission apparently plans to monitor the cellular industry to determine if existing market conditions protect the public interest,[8/] that proceeding has not commenced and there is no Federal oversight in place to protect consumers. Only the existing state regulation represented by the current petitions

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[8/] Second Report and Order, GN Docket No. 93-252, paragraph 285, March 7, 1994.

is available in the petitioning states for this purpose. We urge the Commission to grant the pending state petitions to allow them to continue to maintain existing state regulatory authority as well as initiate its monitoring proceeding.

Respectfully submitted

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Dated: September 19, 1994

FEDERAL REPORTS SUPPORTING LACK OF CELLULAR COMPETITION

1. **Memorandum of the United States in Response to Bell Companies' Motions for Generic Wireless Waivers**, Department of Justice, Civ. Action No. 82-0192, July 25, 1994. After, in its own words, "extensive investigations" into the cellular industry, the Justice Department concluded that (1) cellular exchange markets are not competitive, (2) cellular duopolists have substantial market power, and (3) cellular carriers exercise bottleneck control over their licensed facilities.

2. **Second Report and Order, Regulatory Treatment of Mobile Services**, Federal Communications Commission, Docket No. 93-252, March 7, 1994. After studying reams of material submitted by the facilities-based carriers purporting to demonstrate that cellular is competitive, the Commission "found none of these analyses to be determinative." (Page 61) Instead, the Commission stated that there is "insufficient evidence. . .to conclude that the cellular services marketplace is fully competitive" (Page 62) and announced plans to initiate a rulemaking proceeding to "establish monitoring plans applicable to cellular licensees." (Page 105)

3. **Memorandum of the United States in Opposition to AT&T's Motion for a Waiver of Section 1(D) of the Decree in Connection with its Acquisition of McCaw**, Department of Justice, February, 14, 1994. In stating the Department of Justice's opposition to AT&T's waiver request of Section 1(D) of the Modified Final Judgement, the Memorandum sharply disagrees with AT&T's assertion that the cellular industry is competitive: "Today's cellular markets--regulatory duopolies with significant barriers to entry--can hardly be assumed to be competitive in any significant sense." (Page 7)

4. **Changing Channels: Voluntary Reallocation of UHF Television Spectrum**, Evan R. Kwerel and John R. Williams, Federal Communications Commission Office of Plans and Policy, November, 1992. The report examines the public welfare benefits of creating a third cellular carrier from spectrum now occupied by one UHF television station. The report concludes that new competition from the addition of a third cellular carrier could cause subscriber rates to drop by as much as 25 percent.

5. **Concerns About Competition in the Cellular Telephone Industry**, General Accounting Office, July, 1992. This report reaches few specific conclusions regarding the level of competition in the cellular industry because "additional information, such as cost and profit data, would be needed to conclude that noncompetitive practices occurred." (Page 4) Nevertheless, the report takes a dim view of cellular's duopoly structure: "Generally accepted economic principles imply that a market with only two producers, known as a duopoly market, is unlikely to have a competitively set price that is at or near the cost of production." (Page 3)

6. **Auctioning Radio Spectrum Licenses**, Congressional Budget Office, March, 1992. This report examines the policy of auctioning radio spectrum licenses. To help estimate revenues the Federal Government might generate from spectrum auctions, the report examines the competitive structure of the cellular industry and the value of cellular licenses. Critical assessments of the

cellular industry can be found throughout the report. On page 26, for example, the report notes, "In each local [cellular] market, service providers have only limited incentives to engage in price competition. Above-average profits can be defended by keeping prices well above costs."

7. **Comment of the Staff of the Bureau of Economics of the Federal Trade Commission**, Federal Trade Commission, July 31, 1991, FCC Docket No. 91-34. Among other topics, the paper discusses the structure of the cellular service industry and concludes that "competition from other services is too insubstantial to constrain facilities-based carriers from exercising market power." (Pages 10 and 11)

8. **U.S. Spectrum Management Policy: An Agenda for the Future**, National Telecommunications and Information Administration, February, 1991, Appendix D. This section of the overall report estimates the value of cellular licenses. In so doing, it concludes that if "additional competitors were to enter the [cellular] market, the profits of cellular providers would presumably fall (i.e., the monopoly rents would drop)." (Page D-6, n. 17)

Compiled by the National Cellular Resellers Association
September 15, 1994

CERTIFICATE OF SERVICE

I, Shevry Davis, hereby certify that I have this 19th day of September, 1994, caused to be delivered by first-class mail and hand delivery where indicated copies of the foregoing "Comments of the National Cellular Resellers Association" in response to the petitions of eight states to the following:

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